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UNITED NATIONS WAR CRIMES COMMISSION. 22nd March, 1947.

CORRIGENDA TO TRIAL AND LAW

REPORT SERIES, NO. 30

1) On page 1. of Trial and Law Report Series No. 30, insert the name "BONNEVIE" after the name "HOLMBOE" in the paragraph headed The Court

2) Amend the last complete sentence on page 6. so as to read: "He agreed with Judge Skau that the Decree had been intended to have retroactive effect, though the intention had not been expressly laid down in the Decree itself".

17th March, 1947.

TRIAL OF KRIMINALASSISTENT KARL-HANS HERMANN KLINGE

Sentence of the Supreme Court of Norway, 27th February, 1946.

Report by the Norwegian Representative, J. Aars Rynning.

Charge: Torture of 18 Norwegian citizens of whom one died as the result of the ill-treatment.

The main legal question dealt with by the Court was whether the retroactive application of the Provisional Decree of 4th May, 1945, on the punishment of foreign war criminals, was at variance with § 97 of the Norwegian Constitution.

The Court: The Supreme Court of Norway.

As the case against Karl-Hans Hermann Klinge was regarded as a leading case, all the 13 judges of the Supreme Court took part in the hearing, as laid down by § 2 of Law No. 2 of 25th June, 1926. The judges were: Skau, Holmboe, Schjelderup, Larssen, Alten, Grette, Evensen, Stang, Fougner, Berger, Bahr and Berg.

Public Prosecutor: Statsadvokat Harald Sund.

Counsel for the Defence: Høyesterettsadvokat Adam Hjorth.

Indictment:

On 15th October, 1945, Karl-Hans Hermann Klinge was charged by the Director of Public Prosecution with having committed war crimes by violating:

I. § 228 of the Civil Criminal Code, cf. § 3 of the Provisional Decree of 4th May, 1945, by having ill-treated, at the end of February or the beginning of March, 1945, the Norwegian citizen Carl Oddvar Erichsen during interrogations at the Gestapo H.Q. in Oslo. First Erichsen was forced to bend his knees for a very long time. Then he was beaten with a truncheon across his back and his seat, and finally he was stripped and, his hands and feet bound, was thrown into a bath filled with ice-cold water, where he was repeatedly ducked under. As a result of this ill-treatment Erichsen collapsed and died on the same day.

II. § 229 of the Civil Criminal Code, cf. § 232 and the Provisional Decree of 4th May, 1945, by having ill-treated and tortured 17 Norwegian citizens whom he interrogated at the Gestapo H.Q. in Oslo during the period from November, 1944, to the end of April, 1945. The prisoners were tortured by being beaten with a special heavy truncheon, being hit in the face, and were given cold baths. During the interrogation "Wadenklemmen" and handcuffs were used.

The case against Karl-Hans Hermann Klinge was in the first instance tried by the Eidsivating Lagmannsrett (one of the five courts of appeal). During the trial several witnesses were called for the prosecution as well as for the defence. The Court was satisfied with the evidence as to the defendant's guilt, and on 8th December, 1945, gave the following

Sentence:

The defendant Karl-Hans Hermann Klinge was sentenced to death for having committed crimes against §§ 228 and 229 of the Civil Criminal Code, cf. § 3, a, b and c, and § 1 of the Provisional Decree of 4th May, 1945.

As the sentence of the Lagmannsrett was appealed against it is not necessary to quote the reasons given by the Lagmannsrett judges, as they will appear from the reasons given by the Supreme Court judges which will be reported more fully.

Appeal:

According to the Norwegian law of criminal procedure, the sentence of the Lagmannsrett could not be appealed against on questions of fact but only on questions of law and on the degree of punishment.

The Case for the Prosecution:

The case for the prosecution will be quoted in the reasons given by the Supreme Court judges which are reported below.

Defence:

As a question of law, counsel for the defence argued that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945, and that as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by §§ 228 and 229, cf. § 62, of the Civil Criminal Code.

A subsidiary appeal was lodged against the extent of punishment as according to the defending counsel, the sentence was too severe even if the Provisional Decree of 4th May, 1945, could be applied.

As to the question of law, the defending counsel based his appeal on the following arguments:

(1) Norwegian law does not provide for a more severe punishment than is laid down by §§ 228 and 229, cf. § 62, of the Civil Criminal Code (up to respectively 5 and 8 years of imprisonment).

The Provisional Decree of 4th May, 1945, could not be applied as that would be at variance with § 97 of the Constitution.

(2) Even though international law recognises the death sentence, international law is not part of Norwegian national law. A provision of international law cannot give authority for the application of a more severe degree of punishment without having first been formally incorporated into Norwegian national law.

Judge Skau, the representative of the majority vote, was the first judge to give his reasons in favour of upholding the sentence passed by the Lagmannsrett. He said that the crucial question for the court to decide in the case in hand was whether the provisions of § 97 of the Constitution had to be regarded as precluding the retroactive application of the Provisional Decree of 4th May, 1945. It appeared from the Decree itself and its explanatory memorandum that it was intended that the former be given retroactive effect.

The defending counsel had quite rightly pointed out that it had been commonly accepted in Norwegian legal theory and legal practice that the veto imposed by § 97 was absolute as far as criminal law was concerned. Judge Skau fully realised the force of argument of defence counsel in favour of keeping to a stict interpretation of § 97, and he agreed that an extraordinary situation did not in itself justify or authorise any modification of that provision; on the contrary, it was in extraordinary situations that the provision had its most important purpose to fulfill.

In his opinion there was no question of a conflict with § 97 in the case in hand. It had to be regarded as lying ouside the intended scope of § 97, and therefore the defendant's appeal on those grounds could not be admitted.

The defendant had been convicted for a series of grave acts of torture. Torture, said Judge Skau, was not only criminal according to Norwegian law; it was also a violation of the "laws of humanity" and of the demands of public conscience", as had already been laid down in the introduction to the Hague Regulation IV concerning land warfare, and in Art. 46 and Art. 61 of the convention concerning prisoners of war. The acts for which the defendant had been convicted were, therefore, war crimes, i.e. crimes against the "laws and customs of war". In the list of war crimes worked out for the Versailles Peace Conference of 1919, torture was listed as crime No. III. According to the same "laws and customs of war", war crimes could be punished by the most severe terms of punishment - including the death sentence. In that connection he referred to what had been stated in Oppenheim-Lauterpacht: International Law (6th edition, 1940, p. 459), and to Verdross: Die Volkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten, Berlin, 1920, pp. 12, 20 - 30 and 90 where the legal practice of the states during the last world war had been defined and where the British handbooks of war, 1884 and 1911 were quoted. In other words the criminal character of the acts dealt with in the case in hand as well as the degree of punishment were already laid down in these provisions of international law dealing with "laws and customs of war". Those provisions were also valid for Norway as a belligerent country.

Judge Skau did not consider it necessary to deal with the question whether Norwegian courts were precluded by § 96 of the Constitution ("No one may be convicted except according to law") from trying war criminals in accordance, directly and solely, to the above-mentioned provisions of international law. It had to be regarded as conclusive that such a legal bar had been removed by the passing of the Provisional Decree of 4th May, 1945. That Decree incorporated the

provisions of international law on war crimes into Norwegian law as an integral part of the national legislation as far as it was considered necessary by the Norwegian legislature.

Even under the supposition that Norwegian courts could not inflict any more severe punishment than was provided for by Norwegian law without the passing of the Provisional Decree of 1945, foreign war criminals tried in Norway would not be sentenced for acts which were not criminal at the time they were committed, nor would they be given a more severe sentence than was provided for by international law in force at the time. It was beyond doubt that the acts in question were not only crimes according to Norwegian law but also war crimes, crimes against the "laws of humanity" and the "laws and customs of war". He particularly wanted to stress the international character of the trial and punishment of war criminals as distinct from the trial of the quislings of the various nations.

The late President Roosevelt and Mr. Churchill had llready in their declaration of 25the October, 1941, declared that the disposal of war criminals was one of the main war aims of the Allies. A solemn statement on the punishment of war criminals had been made on 31st January, 1942, in the St. James's Declaration by the governments of those Allied countries whose territories had been occupied by the Axis Powers, and the Moscow Declaration of 1st November, 1943, voiced the same views. Judge Skau then recalled the preparatory work carried out by the United Nations War Crimes Commission for the trial of war criminals, and the conventions which had been adopted by the Allied nations setting out how the various nations should take part in the prosecution of war criminals.

Considering all the above-mentioned declarations, he agreed with the ruling of the Lagmannsrett that in the present case there could be no question of an unconstitutional retroactive application of the Provisional Decree of 4th May, 1945. The passing of that Decree was a link in or a result of Norway's adherence to the agreements between the Allied nations mentioned earlier. The claim of the Allied belligerent nations - among them Norway - to make use of the right to punish war criminals became effective the moment their crimes were committed, being based on and following within the limits of the provisions of international law regarding the laws and customs of war.

The real effect of the Decree, - following the requirements of § 96 of the Constitution - was only to authorise the Norwegian courts to make effective the already existing demand for punishment in conformity with the conventions concluded.

§ 97 of the Constitution is one of the means of safeguarding the citizens against an unjustified infringement by the state of their constitutional rights. Judge Skau agreed with the defending counsel that those safeguarding provisions had been given not only in the interest of the individual citizen but also and primarily in the interest of the community. The arbitrariness and uncertainty which would be caused by an unlimited right to give new laws a retroactive effect would prejudice the most vital interests of the community.

But in these circumstances it seemed unreasonable to maintain that the provisions made for the protection of the community could be

pleaded by foreign intruders - citizens of a state which had attacked that same community in order to subject it - who had used the most reckless and brutal means to achieve this end. Such situations could not possibly have been foreseen by those who drafted the Constitution. To allow such a plea by foreign war criminals would be a violation of the high principles which were the foundation of § 97 and the claim for justice which it supported.

The defending counsel had maintained that it could not be said that the situation had been confused, because the King and his Government in London had every opportunity of keeping the criminal law legislation up to date, and he had quoted the Provisional Decree of 22nd January, 1942, which amended Chapters 19, 21 and 22 of the civil criminal code. This argument, however, was dismissed by the judge as irrelevant.

Another point raised by the defending counsel was that the Provisional Decree of 1942 did not introduce the death sentence for crimes against §§ 228 and 229, and that it was only the Provisional Decree of 4th May, 1945, that provided the possibility of a death sentence for crimes against the above-mentioned paragraphs. Thus the defendant's crimes had been judged more severly than would have been the case if the Provisional Decree of 1942 had been applied.

Judge Skau said that no explanation had been submitted as to why the provisions laid down by the Provisional Decree of 1945 had not been passed into law at an earlier date, but he wanted to draw the court's attention to the fact that the Provisional Decree of 1945, as compared with the one of 1942, besides introducing more severe degrees of punishment, had set out the very characteristics of crimes of the kind dealt with in the case in hand - defining them as war crimes, crimes which were punishable according to Norwegian laws, if they could be covered by Norwegian penal clauses. In Judge Skau's opinion it would have been formally more correct to charge and sentence the defendant for crimes against the Provisional Decree of 1945, making reference to §§228 and 229 of the civil criminal code, and not for crimes against ss 228 and 229 making reference/the Provisional Decree of 1945. As he had pointed out earlier, the Provisional Decree of 1945 had incorporated into Norwegian national law the provisions on war crimes and their punishment laid down by international law. It was to be assumed that the date of the passing of the Decree had depended on the negotiations which had taken place between the Allied nations regarding the disposal of war criminals. It was not only an expression of an altered and more severe judgment of the war crimes dealt with.

Further, he wanted to point out that most probably very few outside the circle of victims who had been directly exposed to the atrocities had a complete idea or knowledge of the character and extent of the Gestapo's criminal methods before these were finally revealed. He was sure that if the Norwegian people could have foreseen at the beginning of the war that the Gestapo would act as they had done, the general and unanimous sense of justice would already then have demanded the same severe judgment of those war crimes as did the Provisional Decree of 1945. He did not agree with what had been said in the explanatory notes to the Traitors' Decree, referred to by the defending counsel to the effect that in the circumstances prevailing during the war, i.e. the country being occupied, the King and his Government abroad, the Storting and the Supreme Court being out of function, "it has not been possible to keep the national

criminal legislation in step with the demands of justice developed in the nation in the war years". It was wrong in his opinion to interpret the quotation to mean that the Norwegian people's sense of justice had changed during the years of war. It would be more correct to say that the people's sense of justice had not been given an opportunity to express itself before the atrocious character of those crimes was revealed.

In his opinion there was no contradiction between the conclusion which he had reached in the present case and the rulings given by that same court in cases against traitors when the question of retroactivity of the various Provisional Decrees had been discussed and decided upon. In that connection he wanted to draw the court's attention to the interpretation given in a recent case against a traitor, by the first judge who said: "In my opinion § 97 of the Constitution vetos a new law introducing punishment for acts which before its promulgation were regarded as lawful. In principle it also vetos the introduction of more severe punishment for such acts". By the reservation made by the expression "in principle", the judge had apparently not wanted to commit himself as to the question whether an increase in punishment introduced by a new Decree would, in all instances, be at variance with § 97 of the Constitution. And when it had been stressed in theory that § 97 had imposed an absolute veto as regards criminal law, it was, no doubt, because circumstances like those with which they were being faced could not have been foreseen.

Having come to the conclusion that the application of the Provisional Decree of 1945 was not, in the present case, at variance with the Constitution, he then proceeded to consider the appeal as far as the degree of punishment was concerned.

Judge Skau agreed with the Lagmannsrett that the death sentence was the only possible punishment in the case in hand. There was no justification for a mitigation of punishment even if § 5 of the Provisional Decree of 1945 (regarding superior orders) were pleaded, as the Lagmannsrett had been satisfied that the defendant had acted on his own accord though with the connivance of his superiors. The defending counsel had stressed the exhorbitant pressure exercised by the Nazi system on the German people and the fact that the subordinates were intentionally mislead as to the lawfulness of the Nazi methods. In that connection Judge Skau wanted to point out that the acts of ill-treatment of which the defendant had been found guilty, were such severe violations of the "laws of humanity" that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, were not only to be condemned morally but were also unlawful.

For the reasons given above, Judge Skau said that he had come to the conclusion that the appeal must be rejected.

Judge Holmboe, who represented the minority, was the first judge to give his reasons for dissenting. He said that in his opinion there was no justification for the application of the more severe punishment introduced by § 3, para. 2, of the Provisional Decree of 1945, as all the crimes had been committed before the promulgation of that Decree. He agreed with Judge Skau that the Decree had not been intended to have retroactive effect, though the intention had been expressly laid down in the Decree itself. The explanation for that omission could most probably be found in the following quotation from

its explanatory notes:

"International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of retroactivity in this respect even though the regulations of the national penal code applicable to war crimes may have beenpromulgated after the crime was committed."

Judge Holmboe said that he could not accept that argument, which had also been put forward by the Lagmannsrett and given further consideration by Judge Skau. In his opinion, § 96 of the Constitution vetos any trial except according to Norwegian law, i.e. according to formal laws or regulations passed by the legislature. It made no difference if there existed corresponding provisions sanctioned by international law which could be applied by international bodies or - as mentioned in the explanatory notes - by the national courts of those countries whose laws admitted the infliction of punishment without special reference to law. The Judge referred to the following passage in the explanatory notes:

"Such an interpretation is alien to the Norwegian conception of law. Norwegian courts can only inflict punishment according to Norwegian civil or military penal clauses. The principle laid down in § 96 of the Constitution must in this connection be interpreted so as to make an arbitrary application of an undefined provision of international law inadmissible. In Norway international law is not incorporated into national laws as an integral part of them, as is the case in various foreign legal systems. Before a rule of substantial character of international law can be applied by Norwegian courts, it must, by a special act, be incorporated into the Norwegian national law."

Judge Holmboe fully agreed with that point of view and only wanted to add that the laws regarding criminal procedure in cases of crimes against the civil criminal code, as well as for crimes against the military criminal code, expressly demanded that the indictment in describing the criminal acts should emphasise the characteristics contained in the provision in question and make reference to the paragraphs applicable to the case. The only exception was made in charges dealt with by courts-martial. But it appeared from § 6 and § 1 of the law of procedure regarding crimes against the military criminal code that even in courts-marial, punishment could not be inflicted except according to Norwegian law. In his opinion those provisions alone were a sufficient objection to arriving at a conviction on the basis only of the international law applicable to the crimes in question at the time of their perpetration.

If that was the case if would follow that Norwegian national law, when incorporating the provisions laid down by international law, would be given retroactive effect if applied to acts committed before its promulgation.

Consequently the main question in the case was whether such retroactivity would be at variance with § 97 of the Constitution. As already mentioned by Judge Skau, it had always been maintained that in Norwegian legal theory it was beyond doubt that § 97 had to be regarded as being an absolute veto against the retroactive application of criminal

law to the detriment of a defendant. That meant that § 97 not only vetoed the introduction of retroactive punishment for acts which were not punishable by the laws in force at the time of their perpetration - a question of no interest in the case - but also the retroactive increase in the degree of punishment. That interpretation of § 97 had always formed the basis of Norwegian criminal law and that was without doubt the reason why that question had not been dealt with by the courts before. The same interpretation had also formed the basis for the Provisional Decrees passed in London during the war. The Provisional Decree of 22nd January, 1942, concerning punishment for membership in the Quisling Party, had not been given retroactive effect. The same applied to the Provisional Decrees of 3rd December, 1942, and 22nd January, 1942 which, inter alia, introduced capital punishment for various crimes against the civil criminal code.

In Judge Holmboe's opinion, in normal circumstances the retroactive application of a law introducing capital punishment for crimes which could only be punished by imprisonment at the time of their perpetration - as in the case in hand - would have been at variance with § 97 of the Constitution.

The question arose whether the extraordinary conditions which followed the war and the occupation justified a more elastic interpretation of § 97 or, as Judge Holmboe preferred to put it, whether those extraordinary conditions could, fully or to some extent, justify the disregarding of that provision altogether. The explanatory notes to the Provisional Decree of 1945, did not deal with that point, apparently considering that the question of retroactivity in the strict sense of the word did not arise as the provisions already existed in international law; a point of view to which Judge Holmboe stongly dissented.

Summing up the arguments referred to above, Judge Holmboe pointed out that there had been no constitutional obstacles preventing the criminal legislation from being kept up to date during the occupation. The Cabinet in London had all the time taken it for granted that, as long as the Storting was out of function, the King could pass the necessary laws in the form of Provisional Decrees. The Supreme Court had adopted that point of view and had accordingly enforced all Provisional Decrees regarding criminal law. He particularly wanted to stress that the very same crimes which were dealt with in the Provisional Decree of 1945 regarding the punishment of foreign war criminals had also been dealt with by the Provisional Decree of 1942, which amended chapters 19, 21 and 22 of the civil penal code. According to its explanatory notes, the Provisional Decree of 1942 expressly aimed at covering serious crimes, such as murder torture and grave bodily injury committed by "the Germans and their collaborators,"and it laid down that the death sentence could be applied for crimes which, according to the provisions of the civil criminal code in the chapters referred to, could be punished by a life sentence. Consequently there seemed to be no need at that time to introduce the death sentence for other crimes mentioned in the same chapters of the criminal code, including crimes for which the defendant had been convicted. After three years, a few days before the capitulation, the authorities responsible for the legislation decided that the Provisional Decree of 1942 did not suffice and that the application of the death sentence should be extended to cover less serious crimes like the ones dealt with in the present case.

Judge Holmboe said that he realised that there could have been various difficulties in keeping the legislation up to date, as for instance trying working conditions and insufficient contact with the public opinion at home. The discussions between the Allies regarding

the disposal of war criminals could also have been a reason for the delay of the passing of new Decrees, but surely those difficulties could not justify the retroactive application of the Provisional Decrees at variance with the Constitution.

One of the predominant ideas of § 97 was that the criminal should be aware beforehand of the punishment which his crime involves. That, though a very important point, was not the only decisive one. One could not accept the argument that German war criminals could, according to the provisions of international law only, expect any other punishment than death sentence in the event of Germany's losing the war. Another not less important result of § 97 was that the state powers, be it the legislature, the administration or the judiciary, should not be given the opportunity of arbitrarily and retroactively introducing or increasing a punishment for an act already committed. In other words, § 97 had to be regarded as a complement to the fundamental principle expressed in § 96 - "No one can be convicted except according to law". He did not agree that the case in hand had to be regarded as lying ouside the field which § 97 was intended to cover. The Constitution and its historical models came to life during a period of wars and revolutions, at a time when terror was not unknown, though it must be admitted that those who drafted the Constitution could not possibly have foreseen such a form of warfare as that waged by Germany during the second world war. § 97 had not been intended to cover certain specified situations but to be an expression of a principle of law which according to its authors should form the basis of the legislation of a free community. One had to be wary of limiting the scope of that provision to suit an extraordinary situation. In normal times that provision was of lesser importance, in any case as far as criminal law was concerned, as it voiced only a principle which would concur with the people's sense of justice. It was in turbulent times that the provision was significant. It could be maintained that the situation with which they were faced was exactly like the one which § 97 was intended to cover. The sense of justice which had matured in the Norwegian people during the occupation had grown under the influence of the terror and indignation caused by the atrocities committed as well as by anxiety and grief. He did not want to make any conjectures as to whether the demand for justice - as maintained by Judge Skau - would have been the same before the occupation. However strongly he felt that the crimes committed against the Norwegian people should be severely punished, experience had shown that an atmosphere born of cruelty and hatred was calculated to upset a carefully considered and fair judgment.

It could be argued that the fact that international law had sanctioned the application of the death sentence for crimes of the kind dealt with in this case justified the view that the Provisional Decree of 1945 was not in itself unfair. That argument, however, could not justify its retroactive and unconstitutional application. Neither did he agree with the view put forward by Judge Skau that it would be unreasonable to accept a war criminal's plea which was based on the Norwegian Constitution. It was of decisive importance that the provision in § 97 contained a veto which was addressed in the first place to the legislature but at the same time also to the judges. It was a binding provision as to the way in which the administration of justice should be carried out in Norway. In effect it constituted of course a safeguard for the criminal as well, regardless of the character and seriousness of the crime. He also drew the court's attention to the fact that the individual German could only be made responsible for the crimes which he had committed during his stay in the country. The crimes they were dealing with in the case in hand were very serious indeed, but that should not prevent the defendant from being tried according to Norwegian law as laid down by the Constitution.

Judge Holmboe had consequently come to the conclusion that the application of § 3 of the Provisional Decree of 1945 to the present case would be at variance with the Constitution. As a result, the punishment should not have exceeded the maximum of 13 years and six months of imprisonment. He admitted that the result was not satisfactory. If it had been possible according to his conception of the law to propose a more severe form of punishment, he would have done so. He was not blind to the fact that it would hurt the people's sense of justice that foreign war criminals were to be punished by a restricted term of imprisonment only, whereas Norwegian torturers could be given death sentences. In that connection, however, it had to be remembered that the traitors were sentenced not only for torture but for treason as well. Taking the long view, however, it was no disaster if a criminal or a group of criminals were sentenced to a more lenient punishment than the judge himself would wish to apply. On the other hand, it was of the greatest importance that the courts, when trying war criminals, should without reservation stick to the unshakable safeguard against despotism as far as criminal law was concerned, namely the provision contained in the Constitution against the retroactivity of a new law, which represented a principle which had prevailed for generations.

He contended that the crimes had to be brought directly within the civil criminal code which, according to its §§ 228, 229, 232 and 62, was applicable to the case.

Judge Bonnevie also agreed that the application of the Provisional Decree of 4th May, 1945 was at variance with §§ 96 and 97 of the Constitution. In his opinion the sentence of the Lagmannsrett should consequently be annulled and the case retried by the Lagmannsrett, particularly as other provisions of the civil criminal code might be considered applicable. According to those provisions, in conjunction with the Provisional Decree of 3rd October, 1941, the death sentence could in his opinion, be applied without violating §§ 96 and 97 of the Constitution. He recalled, however, that the Director of Public Prosecutions had maintained that the crimes dealt with in the case could not be brought under the above-mentioned provisions, which was apparently the reason why the Lagmannsrett had not considered the question whether those provisions could be applied.

Judge Schjelderup agreed with Judge Skau but wanted to add that in his opinion it was sufficient and decisive that the crimes for which the defendant had been sentenced were not only a violation of Norwegian criminal law in the narrower sense but a violation of the commonly accepted provisions of the laws and customs of war. Those provisions came into force as between Norway and Germany on 9th April, 1940, on the outbreak of the hostilities. And those provisions would remain in force until the final peace treaties were signed. The Provisional Decree of 1945, and particularly the already existing criminal provisions referred to in § 1 thereof must not, according to his opinion, as compared with the laws and customs of war, be regarded as anything other than a means of interpretation. According to those commonly accepted laws and customs of war, which in his opinion were directly binding on the defendant, his acts were, at the time of their committing, crimes which could be punished by the death sentence. There was no question of applying a more severe punishment than could be inflicted at the time of the perpetration of the crimes. The laws of war with their severe maximum punishment were clear enough.

Judge Larssen agreed with what had been said by Judge Skau and pointed out that it had been laid down by the provisions of international law that acts like those dealt with in the case in hand were "war crimes"

and could be punished as such by the death sentence. The defendant was bound by those regulations at the time of the perpetration of his crimes. That would have been quite clear if international criminal law could have been made directly applicable be the national court as was the case in some other countries. He recalled that Judge Schjelderup had said that in his opinion such direct application of the provisions of international law could be made by Norwegian courts. So far it had, however, been commonly accepted that § 96 of the Constitution vetoed trials by Norwegian courts except according to Norwegian law. Judge Larssen fully endorsed that view but added that it was quite possible that the provisions of international law would have to be applied directly by the national courts. As the Provisional Decree of 1945 had incorporated the provisions of international law into Norwegian law, however, it was not necessary to discuss that question any further.

As to the question of whether the application of the Provisional Decree of 1945 to the case in hand would be at variance with § 97 of the Constitution, it would not be correct to discuss what the defendant's position would have been if the civil criminal code only were to be applied. His guilt was determined by the fact that his acts were, at the time of their perpetration, subject to international law (i.e. they were war crimes which were punishable even by the death sentence.) It would not alter his legal position even if those provisions of international law could not at that time be directly applied by Norwegian courts because of § 96 of the Constitution. The consequence of such a supposition would only have been that the trial would have had to be carried out by a special court established according to international law, as had been the case with the major war criminals. In view of the fact that the Provisional Decree of 1945 had merely incorporated those provisions of international law into Norwegian law, he agreed with Judge Skau that the new terms of punishment did not place the defendant in a less favourable legal position then he already was in before the passing of that Decree. That implied that the retroactive application of that Decree was not at variance with § 97.

Judge Larssen then said that the consequence of the minority vote would be that the defendant would not be charged as a war criminal but would instead be charged with having violated the provisions of the civil criminal code regarding bodily injury, which would mean his being charge for crimes of a quite different and far less serious character than he had actually committed. § 97 had in its general terms expressed a principle of justice. There would have to be strong and decisive reasons for accepting the minority interpretation referred to above, which would lead to a conclusion which - as Judge Holmboe also maintained - would offend the natural sense of justice. Such reasons were not present as far as he could discern.

Judge Alten substantially agreed with Judge Skau's arguments and conclusions. He further endorsed Judge Larsen's views which, according to his opinion, were in agreement with what had been said by Judge Skau.

Of the remaining seven judges, five (Grette, Evensen, Stang, Bahr and Berg) supported the majority vote, whereas two (Founger and Berger) supported the minority.